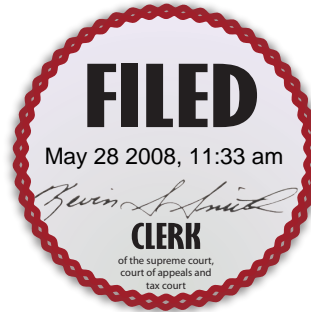


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHN KING,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 71A03-0712-CR-576

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable Roland W. Chamblee, Jr., Judge
Cause No. 71D08-0705-FD-595

May 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

John King appeals his convictions for Class D felony strangulation and Class A misdemeanor battery. We affirm.

Issues

The issues before us are:

- I. whether the trial court erred in refusing to permit testimony by King's brother; and
- II. whether his convictions for both strangulation and battery constitute double jeopardy.

Facts

The evidence most favorable to the convictions is that on March 8, 2007, King was at the home of Roberta Sattar with his three daughters by Sattar, including seventeen-year-old D.K. D.K. and King began arguing. The argument became physical when King pointed his finger at D.K., and she slapped his hand away. King then grabbed D.K. by the neck and threw her on her bed. The two struggled, with King choking D.K. and also striking her with a closed fist. This fight ended with D.K. running out of her bedroom and going with her two younger sisters into their bedroom.

Soon, however, King came into this bedroom and dragged D.K. out of it by her hair. King dragged D.K. onto a couch in the living room, where he began strangling her with two hands. D.K. tried to tell King that she could not breathe, and he replied that he did not care. King stopped choking D.K. after she temporarily lost consciousness.

The State charged King with Class D felony strangulation and Class A misdemeanor battery. It also charged King with Class D felony theft for allegedly

stealing Sattar's cell phone. At King's bench trial held on August 23, 2007, King testified that he had talked to his brother about concerns he had had with D.K. regarding her behavior and trouble at school. King also testified that Sattar had told him about problems D.K. was having, such as getting into fights at school, staying out late, and possibly smoking marijuana. King attempted to question his brother, James King, about discussions the two had had regarding D.K.'s behavior. The State objected to this line of questioning, and the trial court sustained the objection. It found King guilty of strangulation and battery and not guilty of theft. It entered judgments of conviction for both strangulation and battery and sentenced King accordingly. He now appeals.

Analysis

I. James King's Testimony

King first contends the trial court erred in refusing to allow James King to testify regarding discussions he had with his brother regarding D.K.'s behavior problems. We review rulings on the admission of evidence for an abuse of discretion. Boyd v. State, 866 N.E.2d 855, 858 (Ind. Ct. App. 2007), trans. denied. Relevant evidence may be excluded if its probative value is substantially outweighed by the needless presentation of cumulative evidence, or by considerations of undue delay. Ind. Evidence Rule 403.

King apparently wanted to introduce his brother's testimony regarding D.K.'s behavioral problems to provide some kind of justifying context for his battering of her. Even if we were to assume that such evidence was relevant, which we doubt, King was not prevented from testifying on his own behalf regarding D.K.'s behavior. He even specifically related what he had discussed with his brother on that issue. Under the

circumstances, we cannot see how the trial court abused its discretion in refusing to allow James King's testimony when precisely the same evidence came in through John King's testimony. Or, put another way, even if James King should have been allowed to testify fully, any error in him not doing so plainly would be harmless because it did not affect King's substantial rights. See Forler v. State, 846 N.E.2d 266, 271 (Ind. Ct. App. 2006).

II. Double Jeopardy

Next, King asserts that his convictions for both strangulation and battery constitute double jeopardy. The Indiana Constitution's Double Jeopardy Clause, found in Article 1, Section 14 of the Indiana Constitution, "was intended to prevent the State from being able to proceed against a person twice for the same criminal transgression." Richardson v. State, 717 N.E.2d 32, 49 (Ind. 1999). Two or more offenses are the "same offense" in violation of the Indiana Double Jeopardy Clause, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Id. Under the "actual evidence" test, the actual evidence presented at trial is examined to determine whether each challenged offense was established by separate and distinct facts. Id. at 53. To show that two challenged offenses constitute the "same offense" in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish all of the essential elements of a second challenged offense. Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002). To determine what facts were used, we consider the evidence, charging information, final

jury instructions (if there was a jury), and arguments of counsel. Rutherford v. State, 866 N.E.2d 867, 871 (Ind. Ct. App. 2007).

To convict King of strangulation as provided by statute and as specifically charged in the information, the State was required to prove that he knowingly and in a rude, insolent, or angry manner applied pressure to the throat or neck of D.K. in a manner that impeded her normal breathing or blood circulation. See Ind. Code § 35-42-2-9(b)(1). To convict King of Class A misdemeanor battery, the State was required to prove that he knowingly touched D.K. in a rude, insolent, or angry manner, resulting in bodily injury. See I.C. § 35-42-2-1(a)(1)(A). Under these definitions, it is clear that any strangulation also necessarily would be a battery of some kind, but a battery would not necessarily be strangulation. The State here further differentiated between battery and strangulation by specifying in the battery information that King struck D.K. “about the body.” App. p. 3. This specific language would preclude using the same evidence to establish all of the essential elements of both strangulation and battery.

Additionally, although there were no jury instructions here and the trial court in this bench trial permitted little argument, the evidence clearly demonstrates that the battery and strangulation were two separate acts. D.K. testified as to the first physical confrontation between her and King, which consisted of some choking but also King’s striking of D.K. with his closed fist. After this particular incident, some period of time passed before King dragged D.K. into the living room and strangled her to the point of brief unconsciousness. The evidence of the first confrontation supports the battery

conviction, and the evidence of the second confrontation separately supports the strangulation conviction.

Aside from the constitutional actual evidence test, King claims his convictions for strangulation and battery violate four of the five common law or statutory double jeopardy categories: conviction and punishment for an enhancement of a crime where the enhancement is for the very same behavior or harm as another crime for which the defendant has been convicted and punished; conviction and punishment for a crime that is a lesser-included offense of another crime for which the defendant has been convicted and punished; conviction and punishment for a crime that consists of the very same act as another crime for which the defendant has been convicted and punished; and conviction and punishment for a crime that consists of the very same act as an element of another crime for which the defendant has been convicted and punished. See Guyton v. State, 771 N.E.2d 1141, 1143 (Ind. 2002).¹

King fails to develop any analysis as to how battery, the lesser offense in this case, was included within the strangulation charge. This case also clearly is not an enhancement case. Strangulation is not an “enhancement” of battery; it is its own separate crime specifically directed to the increased harm involved in choking a victim. As for the two remaining categories—being convicted twice for the same act and being convicted of a crime that forms an element of a second crime—we believe our analysis

¹ King does not contend that his convictions fall under the fifth common law or statutory double jeopardy category, which is conviction and punishment for the crime of conspiracy where the overt act that constitutes an element of the conspiracy charge is the very same act as another crime for which the defendant has been convicted and punished. See Guyton, 771 N.E.2d at 1143.

under the actual evidence test applies with equal force to these categories. The manner in which the State charged and proved the strangulation and battery offenses demonstrates that they were separate acts. In other words, strangulation could in some cases consist of the very same act as battery or an element of battery, if indeed there was only a strangulation to support a battery charge and no other type of battering. Here, there were two separate physical confrontations and, therefore, convictions for both strangulation and battery are permissible.

Conclusion

The trial court did not commit reversible error in excluding the testimony of King's brother. King's convictions for both strangulation and battery do not constitute double jeopardy. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.